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July 21, 2006

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, MD 20743

Subject: In the Matter of Implementation of Pay Telephone Provisions
CC Docket No. 96-128

Dear Madam Secretary:

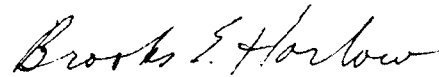
In accordance with Section 1.1206 of the Commission's rules, 47 C.F.R. Section 1.1206, we hereby provide you with notice of an oral and written ex-parte, presentation in connection with the above-captioned proceeding. On July 20, 2006, Brooks E. Harlow of Miller Nash LLP, and Robert Aldrich, of Dickstein Shapiro, LLP, met with Christopher Killion, Paula Silberthau, and Diane Griffin Holland, of the Office of General Counsel, and Tamara Preiss, Pamela Arluck and Lynne Engledow, of the Wireline Competition Bureau. Mr. Harlow appeared on behalf of the Northwest Public Communications Council ("NPCC") and the plaintiffs/appellants in *Davel Communications, et al. v. Qwest*, Ninth Circuit Case No. No. 04-35677 ("*Davel* case"). Mr. Aldrich appeared on behalf of the American Public Communications Council.

At the meeting we discussed the matters summarized in the attached document. Specifically we discussed the opinion issued in the *Davel* case on June 26, 2006, a petition for rehearing Qwest filed in the *Davel* case on July 17, 2006, the expecting timing of the Ninth Circuit's disposition of the petition for rehearing, and our view that the Ninth Circuit's decision was correct. To the extent the same issues are raised in Docket 96-128, we urged the Commission to rule consistently with the Ninth Circuit. Further, we discussed the procedural options and timing of any petition or complaint that the plaintiffs/appellants in the *Davel* case might file at the Commission pursuant to the Ninth Circuit's referral under the doctrine of primary jurisdiction. Finally, we encouraged the Commission to act promptly on the pending petitions in Docket 96-128 and in so doing to address the limited issue referred by the Ninth Circuit.

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We trust you will find this information to be useful. Should you have any questions or require any additional information, please contact the undersigned counsel directly.

Very truly yours,

A handwritten signature in cursive script, reading "Brooks E. Harlow".

Brooks E. Harlow

cc: Ms. Tamara Preiss (via e-mail)
Ms. Pamela Arluk (via e-mail)
Ms. Lynne Engledow (via e-mail)
Mr. Christopher Killion (via e-mail)
Ms. Diane Griffin Holland (via e-mail)
Ms. Paula Silberthau (via e-mail)
Mr. Robert Aldrich (via e-mail)

UPDATE RE QWEST CASES

I. IN *DAVEL V. QWEST*, THE NINTH CIRCUIT HELD THAT:

- "[T]he filed-tariff doctrine does not bar a suit to enforce a command of the very regulatory statute giving rise to the tariff-filing requirement," including suits to enforce regulations or orders implementing that statute.
- The Payphone Providers' lawsuit to require refunds pursuant to the Waiver Order (DA 97-805) is a lawsuit to enforce such an order, *therefore*,
- **The filed-tariff doctrine does not apply to the refund requirement** because the FCC expressly required a departure from the filed rates (i.e., refunds).
- However, the FCC should determine the *length* of the refund period; i.e., whether refunds are only owed for 45 days after Waiver Order or whether refund period continues until such a time as Qwest files NST-compliant tariffs.

II. WAIVER ORDER REQUIRES REFUNDS FOR ENTIRE PERIOD THAT QWEST CHARGED NON-NST-COMPLIANT RATES.

- A. **Federal law requires refunds for the entire period, not just 45 days.**
- Congress forbade Qwest from charging discriminatory rates – 47 U.S.C. § 276(a).
 - To ensure non-discrimination, Congress required rates to comply with the NST – 47 U.S.C. § 276(b)(1)(C).
 - FCC required NST-compliant rates by April 15, 1997 – Cost-based Order, ¶ 163.
 - After April 15, 1997, any rate that was not NST-compliant is *per se* discriminatory and illegal.
- B. **Waiver Order requires refunds for the entire period, not just 45 days.**
- Qwest admitted that the FCC intended Waiver Order to put Qwest's "customers in the same economic position as if the new rates had been filed on April 15."
 - Refund Order itself states that refunds must be paid "from April 15, 1997" until "newly tariffed rates [are] effective." Refund Order, ¶ 2.
 - South Carolina, Tennessee and Kentucky PUCs have correctly determined that refund obligation extends until NST-compliant rates are filed, not just for 45 days.
- C. **Wisconsin Order did not alter or amend the NST requirements.**
- FCC would have to comply with the APA to amend the NST requirements.
 - Qwest never claimed Wisconsin Order amended the NST in its previous legal challenges to the Wisconsin Order. *New England PCC v. FCC*, 334 F.3d 69 (D.C. Cir. 2003).
 - FCC has publicly stated a number of times that Wisconsin Order clarified, but did not change, NST requirements. *E.g.*, 19 FCC Rcd. 15,636 at ¶ 60 (2004).
- D. **Qwest grossly overcharged the Payphone Providers from April 15, 1997 until at least 2002 (see reverse side), and should not be allowed to retain those illegal profits.**

ILLUSTRATIVE¹ QWEST PAL RATES BEFORE AND AFTER NST-COMPLIANCE

QWEST STATE	QWEST PAL RATES, ² 1997-2002	NEW QWEST PAL RATES AFTER 2002	DOLLAR AMOUNT OF RATE CHANGES	PERCENT 97-02 RATES EXCEEDED NST RATES
AZ	\$34.30	\$10.44	-\$23.86	229%
CO	\$43.54	\$15.04	-\$28.50	189%
ID	\$58.74	\$16.41	-\$42.33	258%
IA	\$31.35	\$14.20	-\$17.15	121%
MN	\$43.61	\$15.13	-\$28.48	188%
MT	\$38.94	\$16.91	-\$22.03	130%
NE	\$33.80	\$19.32	-\$14.48	75%
NM	\$43.74	\$12.80	-\$30.94	242%
ND	\$31.54	\$11.93	-\$19.61	164%
OR	\$30.50	\$9.73	-\$20.77	213%
SD	\$38.65	\$18.99	-\$19.66	104%
UT	\$37.00	\$24.79	-\$12.21	49%
WA	\$28.89	\$14.10	-\$14.79	105%
WY	\$28.10	\$18.58	-\$9.52	51%

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Attorneys for Davel Communications, et al.

¹ These rates are "illustrative" because Qwest has multiple rate plans in most states. In some states rates are measured, so the basic line rate plus estimated usage and mandatory EAS charges are shown. The rates shown exclude EUCL, taxes, and fees.

² Public Access Line plus Fraud Protection, a/k/a screening